

EXECUTIVE SECRETARIAT
ROUTING SLIP

TO:

		ACTION	INFO	DATE	INITIAL
1	DCI		X		
2	DDCI		X		
3	EXDIR		X		
4	D/ICS				
5	DDI		X		
6	DDA				
7	DDO		X		
8	DDS&T				
9	Chm/NIC				
10	GC	X			
11	IG				
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13	D/Pers				
14	D/OLL				
15	D/PAO		X		
16	SA/IA				
17	AO/DCI				
18	C/IPD/OIS				
19	Counsel/DO		X		
20	C/PPS/DO		X		
21	C/LA/DO		X		
22	NIO/LA		X		
SUSPENSE		- 1100, 28 Dec 84 - Date			

Remarks To 10: Pls provide coordinated response to Kinnitt for my signature by 1100, 28 Dec, to meet deadline.

Executive Secretary
27 Dec 84

Date

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NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20505

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Executive Registry

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December 27, 1984

MEMORANDUM FOR COLONEL R. J. AFFOURTIT
Executive Secretary
Department of Defense

RONALD L. BLUNT
Special Assistant to the Attorney General
Department of Justice


Executive Secretary
Central Intelligence Agency

STAT

SUBJECT: Position of the U.S. Regarding Nicaragua's
World Court Case (\$)

Attached is the State recommendation, including a draft announcement, for the U.S. position on the pending case brought by Nicaragua in the International Court of Justice. Please provide your comments by noon on 28 December. Thank you. (S)


Robert M. Kimmitt
Executive Secretary

cc: The Vice President
Fred Fielding
Charles Hill

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ES *Signature*
8435034

THE SECRETARY OF STATE

WASHINGTON

~~SECRET~~ SENSITIVE

December 26, 1984

MEMORANDUM FOR: THE PRESIDENT
From: George P. Shultz
Subject: Nicaragua World Court Case

We must decide what position to adopt regarding Nicaragua's pending case against the United States in the International Court of Justice (ICJ).

BACKGROUND

You will recall that Nicaragua filed suit in April, alleging that the U.S. was engaged in military activities (mining Nicaragua's harbors and supporting the Contras) that Nicaragua argued were in violation of the U.N. Charter and international law. We argued that the Court does not have jurisdiction over this issue and that such matters were political in nature and thus inappropriate for judicial resolution. In late November, the Court decided that it has jurisdiction and competence to hear Nicaragua's claims. This decision appears to be motivated more by politics than law and indicates that the U.S. will have difficulty receiving a fair hearing on the merits.

OPTIONS

We have two basic options, neither of which is appealing. First, we can remain in the case (under protest) and defend to the hilt the legality of our Central American policy. Second, we can withdraw from the case now -- although the case will in any event go forward without us.

Under both options, we are almost certain to lose the case. If we stay and fight, the case should take two years or more. If we leave, we can probably expect a judgment during 1985. Under both options, we will eventually have to decide whether to refuse to comply with any adverse judgment that we see as contrary to vital national interests.

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Regardless of the option chosen, we should move now to clarify our 1946 acceptance of the ICJ's compulsory jurisdiction so as to explicitly exclude cases of this sort in the future. (The clarification would, for example, exclude all cases involving "hostilities" or "resort to collective self-defense".) Opponents will argue that any clarification now is an admission that the ICJ did indeed have jurisdiction in this case. However, such a clarification would formalize what we have asserted all along — that the ICJ was never intended to be the arbiter of armed conflicts.

The question remains, however, how best to minimize our losses in a no-win situation in this case. The main pros and cons are as follows:

Option 1: Stay and fight:

Pros

- Avoids a domestic controversy that could complicate chances for Contra funding.
- Confirms traditional U.S. commitment to the rule of law.
- Allows us to present our political case against Nicaragua both inside and outside the courtroom.
- May allow us to mitigate the Court's judgment (i.e., limit an award of damages to Nicaragua and affect the terms of any injunction issued against us).
- Political change in Central America in next two years could favorably affect the case, or perhaps make it moot.

Cons

- Will be hard to make our case because much of our best evidence is sensitive intelligence, and because El Salvador and Honduras have not yet agreed to join us before the Court.
- We may have to defy the Court's judgment after we lose. Having participated on the merits of the case, we may look more like sore losers.
- Might appear contrary to our position that the Court is not the proper place to deal with Nicaragua's accusations.

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Option 2: Walk away from the case now (attached is contingency press statement):

Pros

- Would be affirming that we will not participate in proceedings in which a Court judgment might compromise the principle of collective self-defense and our veto in the Security Council.
- Refusing to participate may ultimately be more defensible than if we defied the Court only after we participated and lost.
- Would avoid the difficulties in making our case (e.g., intelligence evidence; participation of El Salvador and Honduras).
- Would be consistent with the clarification of our acceptance of ICJ's compulsory jurisdiction and our position that this type of case involves political questions that are not appropriate for judicial resolution.

Cons

- Domestic controversy would harm our chances for renewed Contra funding.
- Might appear inconsistent with our efforts to get others (Libya, Iran) to respect rule of law.
- Will be construed by many as an admission that our Central American policy violates international law.
- Congressional and media criticism will shift focus onto our conduct rather than Nicaragua's. (The case will proceed without us, with Nicaragua scoring propaganda points against an empty U.S. chair in the courtroom.)
- U.S. will lose opportunity to shape and perhaps lessen scope of adverse result.

DISCUSSION

The strongest immediate consideration is what hurts or helps our Central American policy. From that perspective, walking out now would complicate our efforts to secure Contra funding and raise a new controversy that diverts attention from the real issues in Central America.

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The long-term and ultimately more significant issue, however, involves the future of the World Court and the perception of the United States as committed to the rule of law in international affairs.

The U.S. has long been in the forefront of those advocating the extension and strengthening of international law and institutionalized structures of justice, including recourse to the ICJ in appropriate cases. We have ourselves used the Court to good effect in the Iran hostage and Gulf of Maine cases. In addition, we have spoken out firmly in support of the rule of law in speeches, statements, and official declarations to great effect. Many peoples around the world look to us as a source of hope in the commitment to the cause of justice under law.

Ever since the earliest days of the ICJ, a large and legitimate body of American opinion has expressed deep concern that a world court would inevitably encroach upon our national sovereignty and might address political questions that are not appropriate for judicial resolution. The present case, which involves issues of collective security and self-defense, crosses the threshold of what we should accept and amounts to a circumvention of the Security Council and our veto.

Second, there is a serious concern that the U.S. commitment to the rule of law is, in this case, being exploited by those for whom law is not a standard but a tool of political systems which are administered in terms of organized or arbitrary power and to whom our concept of due process and justice mean little or nothing. Indeed, two-thirds of the ICJ judges come from nations that do not accept the Court's compulsory jurisdiction at all, thereby avoiding being held to a process that these judges would hold us to.

Finally, if we were to defy the Court after having participated in the case on the merits and lost, our commitment to the rule of law might suffer even more damage. Also, the Court's conduct in this case suggests that it is becoming increasingly politicized. If so, our action now may serve as a useful warning to the Court and hopefully forestall any such trend. The rule of law would be weakened if the Court were to address political questions that are not appropriate for judicial resolution.

RECOMMENDATION

Given the near certainty that we will not get a fair hearing in this case, we should walk out now and clarify that we will not accept the Court's jurisdiction in any future case of this nature. Any defiance of the ICJ after we had

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participated in a full hearing of the issues and lost would be harder to defend than making clear in advance that we regard the entire proceeding as illegitimate. A draft public announcement of our position is attached.

Enclosure - 1
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US Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice

The United States has consistently taken the position that the proceedings initiated by Nicaragua in the International Court of Justice are a misuse of the Court for political purposes and that the Court lacks jurisdiction and competence over such a case. The Court's decision of November 26, 1984, that it has jurisdiction is contrary to law and fact. With great reluctance, the United States has decided not to participate in further proceedings in this case.

US Policy in Central America

United States policy in Central America has been to promote democracy, reform, and freedom; to support economic development; to help provide a security shield against those -- like Nicaragua, Cuba, and the USSR -- who seek to spread tyranny by force; and to support dialogue and negotiation both within and among the countries of the region. In providing a security shield, we have acted in the exercise of the inherent right of collective self-defense, enshrined in the United Nations Charter and the Rio Treaty. We have done so in defense of the vital national security interests of the United States and in support of the peace and security of the hemisphere.

Nicaragua's efforts to portray the conflict in Central America as a bilateral issue between itself and the United States cannot hide the obvious fact that the scope of the problem is far broader. In the security dimension, it involves a wide range of issues: Nicaragua's huge buildup of Soviet arms and Cuban advisers, its cross-border attacks and promotion of insurgency within various nations of the region, and the activities of indigenous opposition groups within Nicaragua. It is also clear that any effort to stop the fighting in the region would be fruitless unless it were part of a comprehensive approach to political settlement, regional security, economic reform and development, and the spread of democracy and human rights.

The Role of the International Court of Justice

The conflict in Central America, therefore, is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution. The conflict will be solved only by political and diplomatic means -- not through a judicial tribunal. The International Court of Justice was never intended to resolve ongoing armed conflicts and is

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patently unsuited for such a role. Unlike domestic courts, the World Court has jurisdiction only to the extent that nation-states have consented to it. When the United States accepted the Court's compulsory jurisdiction in 1946, it certainly never conceived of such a role for the Court in such controversies. Nicaragua's suit against the United States -- which includes an absurd demand for hundreds of millions of dollars in reparations -- is a blatant misuse of the Court for political and propaganda purposes.

As one of the foremost supporters of the International Court of Justice, the United States is one of only 43 of 159 member states of the United Nations that have accepted the Court's compulsory jurisdiction at all. Furthermore, the vast majority of these 43 states have attached to their acceptance reservations that substantially limit its scope. Along with the United Kingdom, the United States is one of only two permanent members of the UN Security Council that have accepted that jurisdiction. And of the 16 judges now claiming to sit in judgment on the United States in this case, 11 are from countries that do not accept the Court's compulsory jurisdiction.

Few if any other countries in the world would have appeared at all in a case such as this which they considered to be improperly brought. Nevertheless, out of its traditional respect for the rule of law, the United States has participated fully in the Court's proceedings thus far, to present its view that the Court does not have jurisdiction or competence in this case.

The Decision of November 26

On November 26, 1984, the Court decided -- in spite of the overwhelming evidence before it -- that it does have jurisdiction over Nicaragua's claims and that it will proceed to a full hearing on the merits of these claims.

This decision is erroneous as a matter of law and is based on a misreading and distortion of the evidence and precedent:

- The Court chose to ignore the irrefutable evidence that Nicaragua itself never accepted the Court's compulsory jurisdiction. Allowing Nicaragua to sue where it could not be sued was a violation of the Court's basic principle of reciprocity, which necessarily underlies our own consent to the Court's compulsory jurisdiction. On this pivotal issue in the

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November 26 decision — decided by a vote of 11-5 -- dissenting judges called the Court's judgment "untenable" and "astonishing" and described the US position as "beyond doubt." We agree.

— El Salvador sought to participate in the suit to argue that the Court was not the appropriate forum to address the Central American conflict. El Salvador declared that it was under armed attack by Nicaragua and, in exercise of its inherent right of self-defense, had requested assistance from the United States. The Court rejected El Salvador's application summarily -- without giving its reasons and without even granting El Salvador a hearing, in violation of El Salvador's right and in disregard of the Court's own rules.

-- The Court's decision is a marked departure from its past, cautious approach to jurisdictional questions. The haste with which the Court proceeded to a judgment on these issues -- noted in several of the separate and dissenting opinions -- only adds to the impression that the Court is determined to find in favor of Nicaragua in this case.

For these reasons, despite our respect for the Court's decisions in other instances, its conduct in this case calls into serious question whether the United States will receive a fair hearing consistent with the law. We are forced to conclude that our continued participation in this case could not be justified.

In addition, much of the evidence that would establish Nicaragua's aggression against its neighbors is of a highly sensitive intelligence character. We will not risk US national security by presenting such sensitive material in public or before a Court that includes two judges from Warsaw Pact nations. This problem only confirms the reality that such issues are not suited for the International Court of Justice.

Longer-Term Implications of the Court's Decision

The Court's decision raises a basic issue of sovereignty. The right of a state to defend itself or to participate in collective self-defense against aggression is an inherent sovereign right that cannot be compromised by an inappropriate proceeding before the World Court.

We are profoundly concerned also about the long-term implications for the Court itself. The decision of November 26

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represents an overreaching of the Court's limits, a departure from its tradition of judicial restraint, and a risky venture into treacherous political waters. We have seen in the United Nations, in the last decade or more, how international organizations have become more and more politicized against the interests of the Western democracies. It would be a tragedy if these trends were to infect the International Court of Justice. We hope this will not happen, because a politicized Court would mean the end of the Court as a serious, respected institution. Such a result would do grievous harm to the goal of the rule of law.

These implications compel us to clarify our 1946 acceptance of the Court's compulsory jurisdiction. Important premises on which our initial acceptance was based now appear to be in doubt in this type of case. We are therefore taking steps to clarify our acceptance of the Court's compulsory jurisdiction in order to make explicit what we have understood from the beginning, namely that cases of this nature are not proper for adjudication by the Court.

We will continue to support the International Court of Justice where it acts within its competence -- as, for example, where specific disputes are brought before it by special agreement of the parties. One such example is the recent case between the United States and Canada before a special five-member Chamber of the Court to delimit the maritime boundary in the Gulf of Maine area. Nonetheless, because of our commitment to the rule of law, we must declare our firm conviction that the course on which the Court may now be embarked could do enormous harm to it as an institution and to the cause of international law.

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Drafted: S/P:PWrodman
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